No. 84-262

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,
*Petitioner,*

VS.

PUEBLO OF SANTA ANA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF *AMICI CURIAE* OF THE ALL INDIAN PUEBLO COUNCIL, PUEBLO OF ISLETA, PUEBLO OF SANDIA, PUEBLO OF SANTA CLARA, PUEBLO OF SAN JUAN, PUEBLO OF LAGUNA, AND PUEBLO OF JEMEZ, IN SUPPORT OF THE POSITION OF THE RESPONDENT

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## QUESTION PRESENTED

Did Section 17 of the Pueblo Lands Act of June 7, 1924, permit New Mexico Pueblos, with the approval of Secretary of Interior, to alienate or convey interests in their land without the sanction of a further Congressional enactment, and did Section 17 authorize the Secretary of Interior to approve such alienations or conveyances?

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

## Table of Authorities (Continued)



FEDERAL STATUTES AND REGULATIONS CITED





## Table of Authorities (Continued)



MISCELLANEOUS

## BRIEF *AMICI CURIAE* OF ALL INDIAN PUEBLO COUNCIL, PUEBLO OF ISLETA, PUEBLO OF SANDIA, PUEBLO OF SANTA CLARA, PUEBLO OF SAN JUAN, PUEBLO OF LAGUNA, AND PUEBLO OF JEMEZ

The *amici curiae*, the All Indian Pueblo Council (hereinafter "AIPC") and the Pueblo of Isleta, Pueblo of Sandia, Pueblo of Santa Clara, Pueblo of San Juan, Pueblo of Laguna, and Pueblo of Jemez (hereinafter "Pueblos") respectfully request that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit, declaring invalid certain rights-of-way approved by the Secretary of Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 (hereinafter referred to as "the Act" or "the Pueblo Lands Act.") Petitioner and Respondent have consented in writing to the filing of this brief in support of Respondent.

### INTEREST OF THE AMICI CURIAE

All Indian Pueblo Council ("AIPC") is a non-profit corporation composed of and organized to represent eighteen of the nineteen Pueblo Indian tribes in the State of New Mexico. The Pueblos of Isleta, Sandia, Santa Clara, San Juan, Laguna, and Jemez ("the Pueblos") are individual, federally-recognized Indian tribes located within the exterior boundaries of the State of New Mexico. The Pueblos were the beneficiaries of the Pueblo Lands Act, the interpretation and application of which is at issue.

The decision below, by invalidating rights-of-way obtained under Section 17 (hereinafter "Section 17") of the Pueblo Lands Act, confirmed the Pueblos' contention that such rights-of-way were in trespass. It further confirmed hundreds of years of consistent legislation, custom, and case law which protect the Pueblos in their capacity as wards of their fiduciaries, the United States of America and earlier

sovereigns. A reversal of the decision below would throw the status of Pueblo lands into question, once again recreating the sort of turmoil which the Pueblo Lands Act was specifically intended to remedy.

Each of the Pueblos has challenged the validity of Section 17 rights-of-way across its lands. While a majority of the resultant lawsuits have been settled or dismissed or are being settled, a few are in an abated status, pending a decision by this Court.[1] The decision in the instant case will affect the Pueblos' interests in such cases. More importantly, the decision in the instant case may have a profound effect on the nature, scope, and extent of Pueblo control over and title to tribal lands in the future.

## SUMMARY OF ARGUMENT

The primary issue in this case is the effect of Section 17 of the Pueblo Lands Act. This Court's ultimate resolution of the issue is critical, less because of its resolution of past disputes than because of the profound impact it will have on the nature and status of all Pueblo lands and, therefore, on the very future of the Pueblos themselves.

Past trespass damages, whether awarded or denied, will not have a very significant effect on the Petitioner, the rights-of-way grantees, or any of the Pueblos; such damages are generally nominal, at best. For this Court to find that all Section 17 conveyances were invalid would not have the effect of unsettling of land titles, as most Section 17 grantees

[1]Of the sixteen lawsuits named in Appendix F to the Petition for Certiorari, Nos. 13 and 16 were erroneously listed and do not involve Section 17 trespasses. Of the remaining fourteen suits, nine are settled and dismissed or are being settled (Nos. 1, 3, 4, 6, 7, 8, 9, 12, and 14). The only ones remaining to be litigated are two against the United States (Bureau of Reclamation), two against the *amicus* Railroad, and one against the New Mexico State Highway Commission.



have never gotten title to Pueblo land but have only received permission to cross or use such lands for specific purposes.

A decision that Section 17 conveyances are invalid would not result in the removal of utility lines from the contested rights-of-way, and would not interrupt train service or interfere with transportation and commerce in the Southwest. Rather, the Petitioner and the other grantees of Section 17 rights-of-way would merely be required to make proper application to the local Department of Interior agency office for valid rights-of-way. Such are granted regularly and as a matter of course. The cost of rights-of-way is generally based on figures and appraisals made by a United States government agency, and negotiations and final transactions are overseen by and subject to approval of the Secretary of Interior. The inconvenience to Petitioner and to *amicus* entities exists, but the chaos and deprivation described in the briefs filed heretofore are fantasized.

For this Court to rule, however, that Section 17 permits the Pueblo tribes to sell, grant, and convey their lands, without statutorily-designated Federal supervision, would result in chaos and disruption in New Mexico virtually identical to that existing in the early part of this century. Such a ruling would place the Pueblo Indians of New Mexico in a status unlike that of any other of the federally-recognized tribes in the United States, all of which are required to go through Congressionally mandated procedures and Federal regulations to grant rights-of-way and other conveyances, and none of which are permitted to sell their lands. Such a decision by this Court would exempt the Pueblo Indians of New Mexico from the Federal requirements and would thus strip them of the Federal protection experienced by other tribes. In addition, it would reward the United States Government for breaching its fiduciary obligation as trustee to the Pueblos, for the United States

has dealt with Pueblo lands to its own benefit and in derogation of its responsibility as protector of such lands.

## ARGUMENT

### Section 17 of the Pueblo Lands Act did not permit New Mexico Pueblos to alienate or convey interest in their lands and did not authorize the Secretary of Interior to approve such alienations or conveyances.

**Introduction**

The first sixteen (16) sections of the Pueblo Lands Act dealt with the procedures for quieting title to lands in New Mexico within the Pueblo Indian land grants. Section 17 looked to the future:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Construction of this single sentence is the central issue, not because it is ambiguous but because it has been wrongfully and abusively applied. The language did not authorize Petitioner's predecessors in interest to acquire Pueblo land, so they stretched the language to imply such permission. Now that Petitioner has been challenged, it seeks to justify its position through a creative but perverse construction of the language of Section 17.



There is no need to second guess the Congress which wrote the sentence, there is no need to "imply" a meaning, and there is no need to search through a virtually nonexistent legislative history and contemporaneous letters. The sentence, indeed, "means exactly what it says," as the Tenth Circuit recognized. *Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co.*, 734 F.2d 1402, 1406 (10th Cir. 1984). After discussing the procedures for quieting title to the Pueblo lands, the Pueblo Lands Act, in Section 17, provided that no right, title, or interest of any kind to Pueblo lands would be acquired in any way except as may thereafter be provided by Congress. In addition, no voluntary conveyances of land by any Pueblo would be valid unless first approved by the Secretary of Interior. Section 17 contemplated future Congressional action to provide the vehicle(s) for such land conveyances, and Congress has in fact responded with several Acts authorizing such conveyances pursuant to statutorily-designated Federal supervision. Section 17 itself, however, did not and does not today provide a proper means for effecting Pueblo land conveyances.

#### A. Historically, the Pueblo Indians were unable to alienate their land without governmental consent and supervision.

For three or four hundred years, the lands of the Pueblo Indians have been protected and to some degree controlled by the reigning sovereign. F. Cohen, *Handbook of Federal Indian Law*, pp. 383-84 (1942). Under Spanish and Mexican rule, the Pueblo Indians could alienate their lands only with governmental consent and supervision. *U.S. v. Candelaria*, 271 U.S. 432, 442 (1926). When New Mexico was ceded to the United States in 1848, the Treaty of Guadalupe-Hidalgo,

Act of February 2, 1848, 9 Stat. 922, guaranteed the protection of existing Pueblo property rights; in other words, the Pueblos remained wards of the sovereign and remained unable freely to alienate their lands.

The Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 25 USC 177, (hereinafter "Non-Intercourse Act") had been passed to protect Indian land titles and to restrict purchase of Indian lands. By the Act of February 27, 1851, ch. 14, 9 Stat. 587, the Non-Intercourse Act was extended to all New Mexico Indians. *Pueblo of Santa Ana, supra*; *United States v. University of New Mexico*, 731 F.2d 703 (10th Cir. 1984); *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1975), *reh. denied* (1976). The Territorial courts of New Mexico chose to treat the Pueblo Indians differently from other Indians (*U.S. v. Lucero*, 1 NM 422 (1869)), and the Supreme Court in *U.S. v. Joseph*, 94 U.S. 614 (1876), acquiesced. But Congress consistently legislated to the contrary, subjecting Pueblo lands to Federal control and taking them out of state jurisdiction. *See e.g.*, Appropriations Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069; New Mexico Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 558, 560. Upon the admission of New Mexico into the Union, the New Mexico Enabling Act in particular made it clear that the Pueblos were "Indians," and that their lands were "Indian country." That Act was sustained by the Supreme Court in *U.S. v. Sandoval*, 231 U.S. 28 (1913).

For the short period of confusion between the decision in *Joseph* and the contrary Federal enactments in 1905 and 1910, the Pueblo Indians were treated by many in New Mexico like other landowners with fee title to their land. For three hundred years prior to 1869, however, and since 1905, the Pueblo Indians did not have that unrestricted freedom and were prevented from conveying their land without governmental supervision.



The Pueblo Lands Act, passed to settle the confusion over the status of Pueblo land and to quiet title, reaffirmed the Non-Intercourse Act as applied to Pueblos, requiring Federal guidance and approval for Pueblo conveyances to be valid. This position was judicially sanctioned in *Candelaria*. With the exception of a short, isolated period, then, the Pueblo Indians have been unable to alienate their tribal land without governmental supervision since the arrival of and conquest by the Spanish in the mid-1550's.

**B. Section 17 parallels the Non-Intercourse Act in prohibiting alienation of tribal lands without Congressional action.**

Although the history behind the inclusion of Section 17 in the Pueblo Lands Act is meager, it does appear that this section was intended to cover the same grounds as the Non-Intercourse Act, though modified to apply to the unique situation of the Pueblo Indians. The Non-Intercourse Act was originally passed in 1834, a time during which the United States was still signing treaties with various Indian nations. By the time the Pueblo Lands Act had been passed, the Pueblo Indians were treated as wards of the Federal government and not as independent sovereigns who could make treaties. They had patents and titles to their lands. Disposal of the lands of a politically dependent entity would occur not pursuant to treaty but pursuant to a Congressionally mandated scheme. For this reason, the second part of Section 17 varies in its wording from the Non-Intercourse Act itself. The parallel remains obvious: land conveyances by Indians were restricted.

Section 17 is altered slightly from the Non-Intercourse Act to apply to the unique status of the Pueblo Indians. Congress perceived that the Pueblos were different from other tribes. They owned their land in fee; their status for twenty-nine years had been completely different from that

of other Indian tribes in that the Pueblos freely had land taken from them; and the United States never entered into any treaties with the Pueblos—treaties being the validifying document for conveyances made pursuant to the Non-Intercourse Act.

At the time the Non-Intercourse Act was enacted, Indian nations were independent sovereigns, not subject to condemnation statutes or the like. But "/t/here is as great need for such protection of the Pueblos of New Mexico, with respect to their lands acquired by purchase, as there is to lands otherwise acquired." *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958). All tribal conveyances at that time were voluntary and made through a treaty, and the Secretary of Interior was unable singlehandedly to initiate or approve treaties with independent sovereign nations. The Act of March 3, 1873, ch. 120, 16 Stat. 566, 25 USC 71, prohibited the making of treaties with Indian tribes, which were no longer recognized as independent nations.

By the time the Pueblo Lands Act was passed, the Pueblo tribes had lost physical possession of much of their land through condemnation, through adverse possession, through judgment liens and tax sales, through voluntary conveyances, and the like. The Pueblo Lands Act attempted to put an end to this, providing first that no future interests in Pueblo lands would be acquired in any way unless and until Congress passed a law permitting it,[2] and providing that Secretarial approval would be a prerequisite for all voluntary conveyances, just as for the other tribes.

The ninety years between the passage of the Non-Intercourse Act and the Pueblo Lands Act were ninety years of

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[2]This stricture was included partially to underscore the sentiment of the time that the Act of March 2, 1899, ch. 374, 30 Stat. 990, 25 USC 311-18, did not apply to the Pueblos—thereby highlighting the need for legislation which would specifically include them.



intense development and change in the Federal-tribal relationship. That a treaty was required for the voluntary sale of Indian land in 1834 and that Secretarial approval was required for the voluntary conveyance of Pueblo lands in 1924 does not negate the effect, impact, and meaning of Section 17, which deals with both voluntary and involuntary conveyances. The difference in the wording of the Non-Intercourse Act and the Pueblo Lands Act is easily understandable in light of the history of Indian tribes in this country, and the close parallel in wording of the two Acts illustrates the Congressional intention in 1924 to extend the restrictions of the Non-Intercourse Act to the Pueblos.[3]

### C. The two clauses of Section 17 are conjunctive, complementary, and clear.

The first clause in Section 17 expressly prohibits the acquisition of any right, title, or interest to Pueblo lands in any way except as Congress may provide at some time after the enactment of the Pueblo Lands Act and includes all conveyances, whether done under the auspices of New Mexico law or otherwise[4]. There is no limitation as to whether

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[3]The statutes cited by Petitioner (Petitioner's Brief in Chief, page 30 n.23) as authorizing alienation of Indian land all require Secretarial consent when dealing with Indian lands from 1873 on. All such statutes are codified, and alienation occurs pursuant to those guidelines found in the Code of Federal Regulations. *See e.g.*, 25 CFR Subchapters H and I. Treaties entered into prior to 1873 generally required the consent of the President of the United States and are not regulated. The difference in the nature of treaties and statutes accounts for the difference in their requirements.

[4]Section 17 expressly referred to the laws of the State of Mexico, whatever they might have been, in prohibiting the acquisition of title to Pueblo lands, but conveyancing "in any manner," involuntary or otherwise, was proscribed. The reference was not limited to condemnation laws but included New Mexico tax laws, judgment lien laws, property laws, case law, and any other law which provided or implied that Pueblo Indians were not Indians and could alienate their lands.

such acquisition be the result of voluntary or involuntary acts of the Pueblos, and the words "in any other manner" should be read to mean "in any other manner" and should not arbitrarily be limited, especially when to do so strains logic and the language. The second clause deals with conveyances made by the Pueblos themselves.[5] Such conveyances, however they are characterized, are invalid without approval by the Secretary of Interior.

The sentence making up Section 17, read as a whole, would prohibit anyone from gaining right, title, or interest in and to Pueblo lands in any way whatsoever, without the instruction of future Congressional acts; even if a Pueblo itself were willing to convey such right, title, or interest, pursuant to such a Congressional act, Secretarial approval would be required. This reading of the sentence is not strained, and it complies with the general history and purposes of the Act, as more fully described hereinbefore and in the other briefs.

The proper way to construe a statute is to look at the language itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). The language of Section 17 is clear and unambiguous. Even were it not, statutes passed for the benefit of Indians are to be liberally construed, with doubt being resolved in their favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Northern Cheyenne Tribe v. Hollowbreath*, 425 U.S. 649, 655 n.7 (1976); *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941), *reh. denied* (1942). This canon of construction is to be applied in conjunction with the policies which require our courts to attend to the clear words and intent of Congress. *Rice v. Rehner*, ——

[5]As such, they are presumed to be voluntary; however, even involuntary conveyances, if made by any Pueblo, would come under the constraints of this clause.



U.S. ——, 103 S.Ct. 3291, 3302 (1983); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

Congress has expressed itself clearly in Section 17. It truly would be unreasonable to attempt to imply Congressional intent when the intent is well expressed, particularly when the resultant implication would mean that, though Congress clearly offered protection to other tribes, it withheld such protection from the Pueblos, abjuring its own control in favor of the ambiguous, unrestricted authority of the Secretary of Interior and his various agents.

**D. Section 17 does not make Secretarial approval the only prerequisite to a valid conveyance of Pueblo land, nor does Section 17 authorize the Secretary to approve such conveyances.**

Section 17 provides that no sale of Pueblo land shall be valid without Secretarial approval, but the requirement of Secretarial approval is not the only prerequisite to a valid conveyance of Pueblo land. Such a reading violates a primary principle of logic: that the expression of one does not necessitate the exclusion of others. Prior Secretarial approval of a conveyance, while required, does not in and of itself validate any conveyance of land by Pueblo Indians, pursuant to Section 17, and there is no implication to the contrary in the statute itself.[6]

Section 17 is merely a one-sentence statement of Congressional policy. It contains no express authorization of power; no procedures, requirements, or regulations to implement it; and no guidelines to the Secretary as to the

[6]For example, a conveyance of lands by the Pueblos, to which the Pueblos did not have title, would not be valid, even though first approved by the Secretary of Interior. Neither would the conveyance of land by Pueblo Indians, approved by the Secretary, if such conveyance were done for illegal purposes. Obviously, Secretarial approval, while required, cannot by itself validate Pueblo conveyances, as Petitioner suggests.

nature, manner, scope, extent, requirements, timing, or boundaries of his approval. Section 17 is not limited to any designated purposes or land uses, does not specify procedures for the alienating of Pueblo land, and does not require or even authorize the promulgation of Federal regulations. Theoretically, according to Petitioner's analysis of Section 17, if the Secretary of Interior or one of his many agents were to indicate in any way, including orally, that he personally approved of conveyancing of Pueblo land, that would legitimize and constitute approval for any future sale, lease, or permit of Pueblo land without further ado. Common sense dictates that Congress would require more than mere oral approval by the Secretary or one of his agents to validate the disposal of tribal lands.

It is clear that, even contemporaneously, the need for something other than mere undefined Secretarial approval was clear. George A.H. Fraser, Special Assistant to the Attorney General of the United States, charged with representing the Government before the Pueblo Lands Board, in a letter dated February 27, 1926, to the Attorney General of the United States, specifically acknowledged the problem:

> . . . Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall not be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it is unfortunate if the Pueblo corporations—and still more the individual Indians—are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. (Appendix 1 to Petitioner's Brief in Chief, p. 4a).

Procedures were necessary for the Pueblo Indians to make their conveyances and for the Secretary of Interior to approve them, and the legislative history shows that future



conveyancing was intended to occur "under strict supervision of the Department /of Interior/."[7] All other aspects of tribal life are controlled by Federal laws and regulated by Federal regulations, from the education of Indians, financing economic developments of Indians, Indian health care, Indian child welfare, development of tribal mineral resources, and the like. *See generally* U.S. Code, Title 25. It is specious to think that alienation of the entire land base of every Pueblo Indian in the State of New Mexico could occur without adherence to any Federal guidelines or regulations at all.

Equally important, nowhere in Section 17 is the Secretary authorized to approve Pueblo conveyances. *See Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983). Such authorization is simple enough to express, had Congress intended to do so. Currently, the statutes governing rights-of-way through Indian land have been codified at 25 USC Section 311, *et seq.* It is worth noting that, for each type of right-of-way involved, the Secretary of Interior is expressly authorized and empowered to grant the relevant rights-of-way.[8] A conspicuous lack of

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[7]*See* Commissioner Burke's statements, *Pueblo Indian Lands: Hearing on S. 3865 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys*, 67th Cong., 4th Sess. 155 (1923).

[8]Section 311: "The Secretary of Interior is authorized to grant permission" for public highways. Section 319: "The Secretary of Interior is authorized and empowered to grant a right-of-way . . . for the construction, operation, and maintenance of telephone and telegraph lines . . . ." Section 320: The Secretary "is authorized to grant" lands for reservoirs, material or ballast pits. Section 321: "The Secretary of Interior is authorized and empowered to grant a right-of-way for oil and gas pipelines." Other statutes are equally explicit. *See also* 25 U.S.C. Sections 323, 396a-396g, 399, 400, 400a, 402-402a, 403a, 403b-403c, 407, 415, 416-416j, and 641-646.

such delegation of power to the Secretary characterizes Section 17.[9]

Congress knows how to express its intent. *Bryan*, 426 U.S. at 389-90; *Southern Pacific Transp. Co.*, 700 F.2d at 554. If Congress had wished to provide a Federal means of alienating Indian lands, it could have done so, undoubtedly in a manner similar to that in which it had previously enacted the Act of March 2, 1899, ch. 374, 30 Stat. 990-92, 25 USC 311-18, and the Act of March 3, 1901, ch. 832, 31 Stat. 1083-84, 25 USC 311, 319, and in which it subsequently enacted the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 USC 322, and the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 U.S.C 323-28. These Acts, both prior and subsequent to the Pueblo Lands Act, dealt with the alienation of Indian land, and none of them purported to do so by merely alluding to the requirement of prior approval by the Secretary of Interior.

More reasonably, Section 17 contemplates a future Congressional enaction which would provide the means by which right, title, and interest in and to Pueblo lands could be acquired, both voluntarily and otherwise, and, further, which would authorize the Secretary of Interior to approve conveyances occurring pursuant to the terms of the second part of Section 17. Such Congressional action was, in fact,

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[9]Petitioner argues that, as sovereigns, the Pueblo tribes have reserved rights and did not need to be delegated power by Congress to convey their lands. This is true, but, to the extent that the issue concerns the extinction of title to lands held by tribes as dependent, not independent, sovereigns, Federal law is inevitably involved. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 626 (2nd Cir. 1981), *cert. denied*, 452 U.S. 968 (1981). Section 17 operated as an exertion of Federal control over Pueblo land, making it clear that, notwithstanding earlier Federal or State enactments or decisions, all future interests in and to Pueblo land would have to be acquired pursuant to a future Congressional enactment.



forthcoming and currently exists, but it did not exist in 1924.

**E. Section 17 required additional Congressional action for the acquisition of any right, title, or interest in and to Pueblo land.**

Section 17 clearly contemplates future Congressional action *prior to* the acquisition of any right, title, or interest to Pueblo lands. If a legislative body wished to prevent the passage of title to land, by whatever means, until future laws and regulations were developed, it could not do so in any clearer manner than to provide that "no right, title, or interest in and to the land . . . shall hereafter be acquired or initiated . . . in any other manner except as may hereafter be provided . . . ."

In 1925, George A.H. Fraser was of the opinion that Section 17 operated as a bar to conveyances of Pueblo land, not as authority for them. It was his understanding not only that existing Federal acts failed to provide justification for grants of rights-of-way, but also that the New Mexico Enabling Act required the express approval of Congress for *any* conveyances of Pueblo land. *See* Appendix 1, p. 4; Appendix 2, pp. 2-4; Appendix 1 to Petitioner's Brief in Chief, p. 51, paragraph 4. Fraser's original analysis was that Section 17 required future Congressional action prior to the conveyancing of any interest in Pueblo lands. This later re-evaluation was the result of Fraser's practical desire to legitimize the existing illegitimate rights-of-way of the politically-powerful.[10]

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[10]In a letter of November 4, 1925, to the Attorney General in Washington, D.C., George A. H. Fraser noted that "/b/y the weight of authority, ejectment will lie against a railway which has come on a man's land as a trespasser, but as a practical matter it is impossible to get rid of a Railway once in operation, and a court would go far to defeat such action in a case like this, where development of the State is promoted and influential local interests are involved." Appendix 1, p. 4; *see also* Appendix 2, p. 4.

Section 17 did not provide the authority for either voluntary or involuntary conveyancing but left that to future congresses. By the Act of May 10, 1926, ch. 282, 44 Stat. 498, Congress passed the Federal condemnation legislation providing for involuntary alienations of Pueblo land. This Act was repealed by implication in 1928, and the resultant right-of-way bill, the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 U.S.C. 322-322a, thereby extended the provisions of the earlier right-of-way acts to the Pueblos. By the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 USC 323-28, consensual right-of-way provisions were added. Today, the land of both Pueblos and other Indians may be alienated, both voluntarily and involuntarily, pursuant to Congressional enactments subsequent to and as contemplated by Section 17.

**F. The administrative interpretation contradicts both the language and purpose of the Pueblo Lands Act and is a violation of the trust responsibility of the United States.**

Although a history of administrative interpretation may be considered by a court in deciding the meaning of a statute, such administrative interpretation is not controlling. *Zuber v. Allen*, 396 U.S. 168, 192 (1969). In particular, if that interpretation is incorrect, either in its construction or in its frustration of Congressional policy, it should be ignored. *S.E.C. v. Sloan*, 436 U.S. 103, 117-18 (1978); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Plateau, Inc. v. Department of Interior*, 603 F.2d 161, 164 (10th Cir. 1979). A history of improper or incorrect administrative action is not precedent and does not obligate the Supreme Court of the United States to condone such practices. The fact that the Federal Government consistently disclaimed its fiduciary duty and failed to protect the Pueblos—a fact which, ironically, is now offered



to show its longstanding contemporaneous administrative interpretation of Section 17—does not mean the fiduciary obligation does not exist, and does not mean that Pueblo land alienation can occur without compliance with Federal law. *See Mohegan Tribe*, 638 F.2d at 623.

This case presents one of the starkest examples in Indian law history of the Federal Government's treacherous conflict of interest. Although obligated to safeguard Indian lands, the Federal Government has treated its obligations as fictitious, seeking, through administrative channels, to expedite the improper alienation of Pueblo lands, not only for third parties but also for the benefit of itself. Its sanction of the use of Section 17 to validate existing invalid rights-of-way and to grant new rights-of-way was an unforgivable abuse of its fiduciary role. This betrayal of its trust responsibility was recognized by the Government when, in 1982, it filed Section 17 lawsuits on behalf of various Pueblos.[11] The very Government currently involved with the resolution of those suits and charged with zealous advocacy on behalf of its charges, is, in the instant case, advocating the opposite view! This on-again, off-again trust obligation and the attendant conflicts of interest have resulted in a pattern of double-dealing and faithless advocacy.

Traditionally, the Federal Government is held to the standards of a fiduciary in administering Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286 (1942). The

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[11] *E.g., United States of America on behalf of the Pueblos of Santa Clara and San Ildefonso, Plaintiffs, v. Jemez Mountain Electric Coop. Defendant*, No. CIV-82-1482M; *United States of America on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santo Domingo, Tesuque, Taos, and Zia, Plaintiffs, v. Mountain States Telephone and Telegraph Co., Inc., and Continental Telephone Company of the West, Defendants*, No. CIV-82-1513C.

Federal obligation was specifically described by the Non-Intercourse Act, which extended the trust relationship to protect the lands of all federally-recognized tribes. *See Morrison v. Work*, 266 U.S. 481 (1924). The Pueblo Lands Act itself characterized the United States as acting "in its sovereign capacity of guardian of said Pueblo Indians." Section 1, Pueblo Lands Act. As the trustee, the Federal Government has certain unique obligations to the tribes and is required to act in good faith and to use reasonable skill and care in exercising its powers as trustee. *Seminole Nation, supra*; *U.S. v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The duty to protect tribal property is even greater when the Federal Government itself is involved in transactions with the tribes. *See Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct.Cl. 1966).

It is clear that, at the time of the Pueblo Lands Act, several entities, including Petitioner, were in trespass on tribal lands and needed a means of validating their existing rights-of-way. No Federal statutes permitting the grant of rights-of-way existed. Section 17 was the only existing statute which could even be stretched to pretend to allow voluntary conveyances of Pueblo land. And so, without further Congressional authorization or action, as required specifically by Section 17, the Federal Government, acting through an agent of the Secretary of Interior, approved the illegal transfers of land.

The Federal Government was well aware that Secretarial approval alone was insufficient to validate Pueblo conveyances, but it failed to step in for the protection of the Pueblos. In the instance of the railway at Jemez, for example, the fact that the railway company had already trespassed, had constructed its lines, and was "impossible to get rid of" was sufficient to cause Federal acquiescence rather



than Federal adherence to Section 17.[12] Such nonchalance and lack of concern about its wards is by itself a gross breach of duty, but the treason was further compounded when, in the 1950's, the Secretary of Interior again utilized Section 17 to the Government's benefit in conveying interest in Pueblo lands to the Bureau of Reclamation.[13] These rights-of-way were granted pursuant to Section 17, despite the fact that alternative valid laws existed, providing exclusive procedures by which interest in the lands of Pueblos may be acquired.[14]

**G. Section 17 is not limited to rights-of-way.**

The Pueblo Lands Act, Section 17, is not limited to rights-of-way. It specifically refers to "sale, grant, lease of any character, or other conveyance of lands" as the acts which require prior Secretarial approval. The United States would have its cake and eat it too, claiming that Secretarial approval can validate Section 17 rights-of-way but cannot validate any other conveyance. This position is unsupportable

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[12]*See generally* Appendices 1 and 2 hereto and Appendix 1 to Petitioner's Brief in Chief.

[13]*See Pueblo of Isleta, Plaintiff, v. James Watt, Secretary of Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of Interior; Midde Rio Grande Conservancy District, Defendants*, CIV-82-1504C; and *Pueblo of Sandia, Plaintiff, v. James Watt, Secretary of Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of Interior; Middle Rio Grande Conservancy District, Defendants*, CIV-82-1536M.

[14]Act of May 10, 1926, 44 Stat. 498 (repealed by the 1928 Act); Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 USC 322; Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 USC 323-28. All of these acts were codified and regulations promulgated thereunder to ensure protection of the tribal lands.

by the statutory language or by logic, and is only understood when one recognizes the contradictory position into which the United States has gotten itself by its two-faced advocation.

The United States, as a fiduciary obligated to protect tribal lands, cannot in any way justify the sale of Pueblo lands with only the undefined and unregulated Secretarial approval as a prerequisite. But, because the United States benefited itself with Section 17 rights-of-way, and because the United States has actively acquiesced in the grant of Section 17 rights-of-way to others, it now argues to this Court that Section 17 permits the grant of *rights-of-way* with Secretarial approval, but does not permit any other sort of conveyance, Secretarial approval notwithstanding. Such a self-serving, shameful position inevitably results when a synthetic protector and fiduciary deals for its own benefit to the detriment of its wards. Either all sales, grants, leases, and conveyances of lands by Pueblos are valid if approved by the Secretary of Interior, or no sale, grant, lease, or conveyance of lands by Pueblos is valid, even with such approval. There is no middle ground and no exception for rights-of-way.

## CONCLUSION

Petitioner would have this Court resurrect the anomalous period existing at the turn of the century when Pueblo Indians were not considered by many to be Indians or to be entitled to Federal protection. Seventy years ago, in *Sandoval*, this Court recognized the error of such thinking and righted the course of the law. Congress did so as well by passing the Pueblo Lands Act requiring Pueblo Indians to be treated as other Indians. The proper construction and application of Section 17 are clear, and the rulings of the trial court and of the Federal appellate court should be sustained. *Amici curiae* respectfully request that this Court hold that Section 17 did and does not permit New Mexico Pueblos to alienate or convey interests in their lands without statutorily-designated Federa supervision.



Respectfully submitted,

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# APPENDIX

# APPENDIX 1

DEPARTMENT OF JUSTICE
Washington, D.C.

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Santa Fe, N.M.
Nov. 4, 1925.

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**BMP No. 210663**

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Department of Justice File 210663-135
Record Group 60 (Section 3)

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PUEBLO LANDS BOARD

The Attorney General,
Washington, D.C.

Sir:

As a matter of information and record, I wish to follow up my last letter (undated, but written about October 30th) on the question of suits to quiet title and other matters arising under the Pueblo Lands Act of June 7, 1924. Also, you may wish to approve or disapprove my tentative views on the proper course to pursue.

1. As stated in that letter, I fear that, even if the objection of multifariousness is overruled, the suit to quiet title may be dismissed against any defendants who prove that they are in possession and raise the objection that a suit in equity deprives them of their constitutional right to a jury trial. If so, there will be tracts the Indian titles to which have been held by the Board to be unextinguished and of which defendants yet retain possession. If such cases occur, I judge that it will be the duty of the United States under its general power of guardianship,

apart from the Act, to bring separate suits in ejectment against such defendants.

Since the Act is mandatory in the matter of a suit to quiet title, I assume that that course must be tried first, whatever we may think as to its soundness.

In the case of Tesuque, it is possible that no defendants will raise the constitutional question, in spite of their announced intention to do so; but in the long run, it is hardly conceivable that this point will not be raised somewhere at some time.

2. I find that under local State practice, in suits to quiet title, it is universal to add to the defendants named "all unknown persons claiming any interest or title adverse to the plaintiff." This is authorized by early acts and by an amendatory act of 1925. Service is then had by publication. I am unable to find any Federal statute or rule authorizing the inclusion of unknown persons as defendants, although there is a familiar statute providing for service by publication on defendants not found. While of course a State act cannot enlarge Federal equity jurisdiction, yet various Supreme Court cases say that a Federal Court may, if it please, enforce a right created by State law. Service by publication in English and Spanish for the statutory six weeks would probably cost about $100.00. It is possible that there are persons not in possession and who have placed no deeds on record who yet have deeds from a Pueblo or some Mexican living thereon which might later form the basis of a claim. A very large number of the earlier deeds presented to the Board as color of title have never been recorded.

The question then is whether it is worth while to make "unknown persons" defendants and to incur the expense of service by publication, in view of the uncertainty whether this will do any good. Considering that this is the regular practice in New Mexico and that it apparently effects a completeness otherwise wanting, I am inclined to follow it. Please give me your instructions as to this.



3. This same difficulty becomes acute in the case of the Pueblo of Jemez, where only three non-Indian claims were presented. I do not know how the Board will decide them, but having listened to the evidence would expect it to uphold them. If so, there would be no known claimants at all to the Indian lands title to which the Board finds unextinguished, and if the suit to quiet title is brought, the only possible defendants would be "unknown defendants. Yet, under the provisions of the Act, the suit is mandatory.

If this turns out to be the situation, I would be inclined to bring the suits against "unknown defendants" for what it may be worth.

4. But Jemez will probably produce still another complication. On July 11, 1924, the Secretary of the Interior approved an application of the Santa Fe & Northwestern Railway Company for a right-of-way across the Jemez Pueblo lands, a distance of about 14 miles (incidentally, a similar right-of-way was approved across two other Pueblo grants,- Zia and Santa Ana). This was in pursuance of surveys and negotiations beginning about July, 1921. The Indians were very loath to permit the railway to cross their grant, but were finally persuaded or gently forced to do so. No court proceedings were had. An informal appraisal of damages was made by H.F. Robinson, Supervising Engineer, Indian Irrigation Service, Albuquerque, F.C.H. Livingston, then Special Attorney for the Pueblo Indians, Belen, and Louis R. McDonald, Agency Farmer, Jemez Pueblo, aggregating 2,946.55. This amount was apportioned and distributed among the individual Indians whose lands were taken, or damaged, although part went to the Pueblo as an entity. The money was accepted, although apparently with some demur. Mr. Robinson, who is an experienced and conscientious man, assures me that the damages awarded were adequate. The whole matter was engineered by H.P. Marble, Superintendent of the Southern Pueblos, Albuquerque, who recommended approval to the Commissioner of Indian Affairs, who, in turn, recommended it to the Secretary. The railway was originally a private carrier—a logging railway—

but has recently been recognized as a common carrier by the Interstate Commerce Commission. It was constructed across the Pueblo during 1923 and 1924; probably had trains running in 1924, and is still in operation.

The Act by which it is attempted to justify all this is that of March 2, 1899, 30 Stat. L. 990, as amended June 25, 1910, 36 Stat. 859, Compiled Statutes, Sec. 4181. This authorizes, under certain conditions,

> "A right-of-way for a railway, telegraph, and telephone line through any Indian Reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian Agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation."

The only possible portion of the above which could authorize the allowance of this right-of-way is the expression "through any lands held by an Indian tribe or nation in Indian Territory." But Sections 22 and 23 of an Act of Feb. 28, 1902, 32 Stat. 50, repealing the above Act insofar as it applies to Indian Territory and Oklahoma, make clear to my mind that the expression "Indian Territory" means the territory now embraced in the state of Oklahoma and not Indian territory in general. The statute relied on, therefore, seems to me to furnish no justification for the grant or approval of this right-of-way over lands owned in fee by the Pueblo. This view is emphasized by Section 17 of the Pueblo Lands Act of June 7, 1924, reading in part:

> "No right, title or interest, in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined, shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress*."



This was passed prior to the Secretary's approval. If the foregoing is correct, the railway is a trespasser, and indeed could only have acquired a right-of-way by special act of Congress in view of Section 2, paragraph 2, of the New Mexico Enabling Act, whereby the Pueblo lands are declared to be "subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

The Railway Company did not present its claim to the Board, which informally advises me that it intends to return the land over which the railway passes, as Indian land the title to which has not been extinguished.

The question will then be squarely presented as to what course we must take. Section 3 of the Pueblo Lands Act requires a suit to quiet title to all Indian lands so returned, but as above stated, the only known defendant so far will probably be this Railway Company, which is unmistakably in possession, so that a suit to quiet title will not lie. By the weight of authority, ejectment will lie against a railway which has come on a man's land as a trespasser, but as a practical matter it is impossible to get rid of a Railway once in operation, and a court would go far to defeat such action in a case like this, where development of the State is promoted and influential local interests are involved.

An action in trespass for damages will also lie, and in this case the amounts actually paid the Indians could be counterclaimed. If they were adequate, plaintiff would have no recovery.

Although satisfied that the Appraisers acted in good faith and believed the award to be adequate, I doubt if it is really so for this reason: In the way these people live, two or three acres will support a family all their lives. An award of $300 or $450 producing a theoretical income of $18.00 or $27.00 a year, is obviously a totally inadequate equivalent.

After much reflection, I recommend two proceedings in Jemez, in case the situation develops as hereinabove indicated.

(a) A suit to quiet title against all unknown defendants.

(b) An action in trespass against the Railway Company, in which we may hope to recover some additional damages.

While one is reluctant to criticize the course of the Department of the Interior, it seems to me that if the land over which the Railway runs is returned by the Board as Indian land with unextinguished title, the Lands Board Act leaves no alternative but to sue. This is especially appropriate where the Department has acted without any opinion from the Attorney General and apparently without authority of law.

5. There will be still another difficulty at Jemez. On September 28, 1878, an agreement was made between the Governor and Principals of Jemez and B.M. Thomas, then Indian Agent, reading as follows:

"It is hereby agreed by and between the Pueblo of Jemez, represented by the Governor and officers and principals thereof, on the one part; and B.M. Thomas, U.S. Indian Agent on the other part, that a certain piece of land situated at the northeast side of the Pueblo of Jemez, extending from the house now being built thereupon, for Mission and School purposes, distances and directions herein described, viz: To the north seventy-five yards; to the east thirty-five yards; to the south seven yards; to the west ten yards; be and hereby is devoted to school purposes for the benefit of said Pueblo, so long as the parties building the house shall maintain a school upon said premises for the benefit of said Pueblo.

"In testimony whereof we, the parties of both parts, hereby sign our names at the Pueblo of Jemez this twenty-eight day of September, one thousand eight hundred and seventy-eight."

(Signed by the Governor and 12 other officials and Ben M. Thomas, U.S. Indian Agent.)



Although no mention is made of the real party in interest, this agreement was for the use of the Presbyterian Mission, which proceeded to construct a building on the premises described. I am told that it might cost $1500 or $2000 at present prices to reproduce it.

This agreement is not a lease and may probably be classified as a license to occupy the land. The Mission presented no claim to the Board, which therefore took no official cognizance of the situation and will probably return the land in question as Indian land the title to which is not extinguished. Since the Act requires suit to quiet title to such land, at first glance it would appear that the Mission should be made a defendant; but it is obviously in possession and therefore a suit to quiet title is not appropriate, at least if objection on that ground is made. Further, insofar as the above agreement has any legal effect, it shows that the Mission's possession is not adverse, for which reason also a suit to quiet title is inappropriate.

Probably the Mission is technically maintaining a school, as the agreement provides, since it has the building with a person ready and willing to teach. In fact, however, there is not a single pupil in attendance, nor has there been for a long time back, and the Indians, or some of them, would like to have the land, and more especially the building.

After attempting to balance the faces, my opinion is that the Mission should not be made a party to the suit to quiet title, nor otherwise sued, because its possession is not adverse. If the Indians are dissatisfied with the situation, they should first give notice to the Mission of the termination of the license, and then proceed, independently, or ask their official attorney, to proceed to recover possession in any appropriate way. If you disagree with the foregoing, please inform me.

6. You are aware from this and previous letters that the Lands Board Act is a well meaning but ill constructed measure which develops difficulties at every step. Mr. Jennings intends to submit to you before long an amendment to Section 2, designed to clarify the financial situation, and naturally the desirability

of amending the Act in various other particulars has been under discussion. There seems to be much hesitation, however, in suggesting any change to Congress because the difficulty of procuring the passage of the Act in its present shape was so great that there is fear lest it be emasculated if the attention of Congress is again directed to it.

So far as the suit to quiet title goes, it is doubtless desirable to try out the working of this requirement before suggesting any change. There is, however, one matter which seems to me of immediate importance. The valuation report required by Section 6 is given the effect of a judicial finding and final judgment. The primary report required by Section 2, which separates the Indian from the non-Indian lands, is not expressly given any weight whatever, although it is the most important of the four reports provided for. So far as the Act shows, its only effect is to describe the Indian land which is to be the subject of the suit to quiet title and in a way to designate the defendants in such suit, or some of them. I think at least that this report should be prima facie evidence in the suit of the matters and things therein decided, and I also think that it should be permissible to introduce in the suit the evidence taken before the Board, or any part of it, subject, of course, to be rebutted or supplemented by other evidence. If you agree with me in this, I will be glad to submit a draft of a proposed amendment to Section 3 along these lines.

Respectfully,

Special Assistant to the
Attorney General

GAHF-S



## APPENDIX 2

SANTA FE, NEW MEXICO,
February 24, 1926.

E.W. Dobson, Attorney at Law,
P.O. Box 650,
Albuquerque, N.M.

U.S. ex rel. Pueblo of Jemez vs. Santa Fe
& Northwestern Railway Company.

Dear Mr. Dobson:

Pursuant to our telephone talk yesterday, I write to set forth my position and theory as to this case.

1. The Pueblo Lands Board, in its report on Jemez Pueblo, filed in the U.S. District Court November 24, 1925, and headed "Title to Lands Granted or Confirmed to Pueblo Indians not Extinguished," says the following regarding this railroad:

> "The Board further finds that the lands, the title to which has not been extinguished, are burdened with what is known as the
>
> SANTA FE & NORTHWESTERN RAILROAD
>
> The constructed line of this road crosses the entire Pueblo from north to south, following the bed of the Jemez River, and occupies a location in some places fifty feet, in others one hundred feet in width.
>
> The Indian title in the lands embraced in this location has not been extinguished, but such lands are subject to whatever servitude or burden may be constituted by the construction and operation of this railroad and the right of way granted to the Santa Fe & Northwestern Railway Company by the Department, July 11, 1924, under the act of March 2, 1899, (30 Stat. L., 990)."

In view of this finding, Sections 1 and 3 of the Pueblo Lands Act of June 7, 1924, made imperative a suit to quiet title against the Railway Company. Section 1, you will observe, requires such suit to cover "any claims of any kind whatsoever adverse to the claim of said Pueblo Indians as hereinafter determined." The reason why the Railway Company is the only defendant is that there were only four other claims in Jemez adverse to the Pueblo title and all of these were upheld by the Board. Therefore, under the Act, they do not come within the scope of the suit to quiet title.

2. Of course no title by adverse possession has had time to accrue in favor of the Railway Company and its claim rests alone on the Act of March 2, 1899, 30 Stat. L, 990, as amended 36 Stat. 859; U.S. Compiled Stat. Sec. 4181, et seq. This authorizes under certain conditions, "a right of way******** through any Indian Reservation in any state or territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian Agency, or for other purposes in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty but which have not been conveyed to the allottee with full power of alienation."

The only portion of the above which could possibly authorize the allowance of this right of way through Pueblo lands held in fee by the Indians and to which the United States has never had title, is the expression "through any lands held by an Indian tribe or nation in Indian Territory." The remainder of the Act, especially compiled Statutes 4183 and 4185, make it perfectly clear, however, that "Indian Territory" means the country included now within the State of Oklahoma; as also does the Act of February 27, 1902. 32 Stat. pp. 45-51, in part repealing the above Act. This being true, said Act furnishes no justification whatever for a grant of this right of way over Pueblo land.

This is emphasized by the familiar language of the New Mexico Enabling Act, to the effect that such lands "shall be and remain subject to the disposition and under the absolute juris-



diction and control of the Congress of the United States." This, I take to mean that thereafter, in view of the peculiar status of the Pueblos and their lands, no disposition of the same, or of any right therein, could be made without express approval of Congress.

All this is made absolutely certain by Section 17 of the Pueblo Lands Act of June 7, 1924, reading in part:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may *hereafter* be provided by Congress."

This was passed before the Secretary of the Interior approved your right-of-way.

There are also some minor objections, e.g. Section 4161, supra, provides that "in case objection to the granting of such right of way shall be made, said Secretary shall afford the party so objecting a full opportunity to be heard." As you know, the Indians seriously objected to the granting of this right of way, but no opportunity whatever of hearing before the Secretary was granted.

Again, Section 4185 provides for the payment of an annual charge of not less than $15.00 a mile on the mileage of the line through the Indian land, in addition to other compensation. I am not informed that this payment has been made.

These two things, however, are trivial as compared with the fundamental weakness first outlined.

Having made a full disclosure of my reasons for considering this grant invalid, I am sure you will reciprocate by similarly informing me of any reasons you may have for maintaining it.

3. Noting your desire for an early trial, in which I join, I assume that you will there produce your permit from the Secretary of the Interior, with my supporting documents.

Please inform me whether you will also admit the purpose of the Company to continue to maintain and operate its railroad if not prevented, and whether you will prove or state in open court, or stipulate, the date when the railroad was constructed? The proof, on either side, will, I imagine, be very slight, since the case will turn on the law rather than the facts.

4. The following is a statement of my personal and unofficial views as to this situation. I am informed that this railroad is a valuable public utility and should be favored rather than discouraged. If the case should be decided in plaintiffs' favor, I would not attempt to obtain a decree ousting the Company or hindering the operation of its road, but would ask merely for the quieting of the Pueblo title as against it, leaving it to seek protection by an Act of Congress which, in my judgment, is the only way in which it can obtain a legal right across the Pueblo. This is inevitable, in view of Section 17 of the Pueblo Lands Act above quoted. Please understand clearly that the foregoing represents merely my individual views, and does not in any way bind the Department of Justice.

Please let me hear from you within the next few days, addressing me as above at Santa Fe, and letting me know when you wish this case taken up, and giving me an outline of your defense, if any. I will be glad to meet your wishes in any way that I properly can.

Very truly yours,

Special Assistant to the
Attorney General.

CAHF-S